IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 294 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PATEL NATHUBHAI DEVABHAI

Versus

ANJANA HIRJIBHAI RAMJIBHAI SINCE D/D THROUGH HEIRS:

Appearance:

MS KUSUM M SHAH for appellant

MR SK ZAVERI for respondent

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 20/06/2000

ORAL JUDGEMENT

1. This Second Appeal against the judgment and decree dated April 1, 1981 recorded in Regular Civil Appeal No. 44 of 1978 by the learned Joint District Judge, Banaskantha at Palanpur, at the instance of the plaintiff was admitted for hearing on the following substantial questions of law:

"(1). Whether there was error in coming to the conclusion that plaintiff alone had the right to file the present suit?

(2). Whether there was a case involving necessity to discharge rain water having regard to the surface of the land belonging to the parties?"

2. The appellant is the original plaintiff whereas the respondent is the original defendant. They are, therefore, referred to in this judgment as 'the plaintiff' and 'the defendant' for the sake of convenience and brevity.

3. The plaintiff filed suit claiming that he was the owner of the field bearing S.Nos.89/1 and 89/2 situated in the sim of Hoda, Taluka Palanpur. On the western side of the said field there was the field of the defendant. In between these two fields there was a 'shedhi'. The field of the plaintiff was on higher side than the field of the defendant. As a result of this, when there was water accumulation in the plaintiff's field it would naturally flow towards the field of the defendant. As per case of the plaintiff, the field bearing S.No. 89/1 was purchased in the year 1956 by his father Deva Hira along with his two brothers whereas field bearing S.No. 89/2 was purchased by his father alongwith his another brother Dwarka Hira and after partition those fields came to the share of his father. Since his father was old and the plaintiff was managing affairs, he had filed the suit claiming right of easement over the field of the defendant and prayed to restrain the defendant from constructing bandh over the common shedhi and for a direction to the defendant to remove the 'dhalia' constructed at that place.

4. The suit was contested by the defendant by filing written statement whereby all the averments made in the suit including the averment of right of easement were denied. It was also denied that there was a shedhi between the fields of the parties. It was admitted that there was an old dhalia or bandh constructed by storing new earth which was of exclusive ownership of the defendant. It was also denied that the field of the plaintiff was on the higher level than that of the defendant. It was also denied that the accumulated water flows naturally towards the field of the defendant and in order to prevent such flow of water, the dhalia was newly constructed. So far as the ownership right of the

plaintiff is concerned it was specifically denied and contended that the plaintiff was not the exclusive owner of the suit field which he claims to be of his exclusive ownership and, therefore, without joining other co-owners the suit was not maintainable. Ultimately, the defendant prayed that as the plaintiff has no cause of action, the suit should be dismissed with costs.

5. The learned trial Judge framed as many as 15 issues, recorded evidence and after considering, appreciating and evaluating the same and after hearing the learned advocates for the parties, recorded the following conclusions:

(i) The plaintiff proved that the suit field bearing S.Nos.89/1 and 89/2 came to the share of his father in partition.

(ii) The plaintiff proved that the defendant had encroached upon the plaintiff's land by newly constructing dhalia of earthen embankment at the eastern border of the plaintiff's field.

(iii) The rain water will accumulate in the plaintiff's field by the construction of earthen embankment by the defendant.

(iv) The plaintiff proved his right to discharge rain water through the field of the defendant.

(v) The suit is not bad for nonjoinder of necessary parties.

On the aforesaid premises the learned trial Judge came to the conclusion that the plaintiff is entitled to get permanent injunction as prayed for and resultantly he passed decree dated June 30, 1978 permanently restraining the defendant from causing any obstruction to the flow of rain water from the land bearing S.Nos.89/1 and 89/2 through the land of the defendant in the west and further ordered the defendant to remove the encroachment of the land of the plaintiff committed by his making of the pala on the east of the common border between the lands of the parties to the suit.

6. Aggrieved by the above mentioned judgment and decree the defendant went in appeal before the learned District Judge, Banaskantha District by filing Regular Civil Appeal No. 44 of 1978.

7. The learned lower appellate Judge on

reappreciation and reevaluation of the evidence adduced and produced before the trial court and submissions canvassed at the bar by the learned advocates appearing for the parties, allowed the appeal by setting aside the judgment and decree recorded by the trial court and thereby dismissed the suit of the plaintiff. The learned lower appellate Judge while allowing the appeal recorded the following conclusions:

(I) The plaintiff had no legal right to file the suit.

(II) The suit was bad for nonjoinder of necessary parties.

(III) The plaintiff failed to prove that the defendant had made an encroachment of land on his S.Nos.89/1 and 89/2 by making a bandh.

(IV) The plaintiff failed to prove that he had a right to discharge water from his fields bearing S.Nos.89/1 and 89/2 to the field of the defendant.

Resultantly the plaintiff was not entitled to get permanent injunction as prayed for. It is this judgment and decree recorded by the learned lower appellate Judge which is under challenge in this Second Appeal at the instance of the plaintiff on the substantial question of law to which reference has been made in earlier paragraphs of this judgment.

8. I have heard Ms. Kusum Shah, learned advocate for the appellant and Mr. Zaveri, learned advocate for the respondent.

9. Ms. Shah contended that the lower appellate court has misread and misconstrued the oral and documentary evidence on the record of the case, and therefore, on misconception of law and on patently erroneous appreciation of evidence on record, the lower appellate court has wrongly set aside the decree passed in favour of the plaintiff by the trial court. It was stressed that the lower appellate court has failed to appreciate that the partition could be oral as well which has resulted into miscarriage of justice. It was maintained that the lower appellate court has erred in not considering that every son in a joint Hindu family gets right in the property by birth and thus the plaintiff had right by birth in S.Nos.89/1 and 89/2 and any obstruction to the said right was sufficient in law

to give the plaintiff right to file a suit. It was also emphatically submitted that the right to discharge rain water goes with the land and any person having interest over the land can file suit for protection of such right and thus the suit filed by the plaintiff was perfectly valid in the eye of law. It was submitted that the lower appellate court has patently erred in law in dismissing the suit merely on technical ground because of the non-joinder of parties without taking recourse to provisions of O. 1, Rule 10 of the Civil Procedure Code. On the aforesaid submissions, it was prayed to allow the appeal by quashing and setting aside the judgment and decree passed by the lower appellate court and to restore the judgment and decree passed by the trial court.

10. In counter submission, Mr. Zaveri contended that the plaintiff having failed to prove that he was the sole owner without joining other co-owners either as a plaintiff or as a co-defendant the suit was bad for non-joinder of necessary parties and, therefore, the lower appellate court has very rightly held that the plaintiff had no right to file the suit. He maintained that there was no evidence emerging on the record to consider that the plaintiff's easement right had been violated since the plaintiff had failed to prove that his land was at a higher level and the defendant had made encroachment on his land by making a bandh and, therefore, no error of law or fact has been committed by the lower appellate court in dismissing the suit. On the contrary the lower appellate court has very rightly reappreciated and reevaluated the evidence and recorded just and correct decree which cannot be interfered with by this court while exercising powers under section 100 of the Civil Procedure Code. It was also stressed by him that there is no question of law much less substantial question of law surfaced in this Second Appeal requiring interference at the hands of this court and ultimately he prayed for dismissal of the appeal.

11. At the outset it is to be noted that there was no dispute that the suit land was not belonging to the exclusive ownership of the plaintiff. There is evidence to the effect that the plaintiff's father Deva Hira and his two brothers purchased land bearing S.No.89/1 in the year 1956. Similarly, the land bearing S.No. 89/2 was purchased by Deva Hira alongwith his another brother Dwarka Hira. So far as the partition pleaded by the plaintiff is concerned, there is no document forthcoming that there was any partition between the members of the family. There is no manner of doubt that the plaintiff himself had admitted that there was no writing about the

alleged partition and no entry was made in the Government records about the said partition. So far as the question of non-joinder of necessary parties is concerned, the learned lower appellate court has made weighty observations in para 10 of its judgment and it would be appropriate to refer to the same in this judgment, which reads as under:

> "(10) Moreover the defendant contended that the suit is bad for non-joinder of necessary parties. He has contended that the other co-owners were not joined as plaintiffs in the suit and therefore the suit is said to be bad. The learned trial Judge has observed in para 8 of his judgment that these lands are held to be belonging to the plaintiff and his father and it is said that the father of the plaintiff was old and it was plaintiff who looked after the house hold matter and that in such suit for injunction all the owners of the land need not be joined as plaintiff and therefore the suit was not held to be barred by for non-joinder of necessary parties. In the case of non-joinder of necessary parties the suit is to be dismissed because in their absence the court cannot pass an effective decree at all when a property is owned by several co-owners and when any relief of removal of encroachment as well as injunction is claimed with respect to that property it can very well be said that all such co-owners are necessary parties to the suit and without them the court cannot pass an effective decree and therefore the suit is bad for non-joinder of necessary parties. No authority has been pointed by the trial Judge to show that in a suit for injunction all the owners of the suit lands are not necessary parties. Moreover the plaintiff is not at all the owner is an admitted fact as the owner is his father who is one of the purchasers of the suit fields and their father is still alive thus the finding recorded by the trial Judge on this point is not correct and requires to be set aside."

12. In my view, the aforesaid observations made by the learned lower appellate Judge clinches the issue. It is settled law that without the real owner alongwith co-owners son of one of the co-owners cannot bring an action in the court of law by filing a suit wherein the relief of injunction against a third party is claimed. So far as the instant case is concerned, at the cost of repetition I must say that the plaintiff is not the

owner. Even he is not a co-owner. His father is a co-owner along with his brothers. Therefore, in my view, no error of law or fact has been committed by the learned lower appellate Judge in dismissing the suit of the plaintiff on this ground.

13. This takes me to the examination of the second substantial question of law formulated by this Court and to find out as to whether there was a case involving necessity to discharge rain water having regard to the surface of the land belonging to the parties.

14. So far as evidence on this point is concerned, the learned lower appellate court has observed that the plaintiff has no personal knowledge about the position as to whether flow of water from his field was going to the field of the defendant in view of the fact that his father had purchased the land in the year 1956 and, therefore, the plaintiff cannot be expected to have knowledge prior to 1956. The plaintiff has not examined any witness or produced any evidence in order to prove that from the time immemorial the flow of rain water was from his field to the field of the defendant. The witnesses examined by the plaintiff also did not say anything about the flow of water. Merely because of the fact that the field of the plaintiff was at higher level and the field of the defendant was at lower level would not lead to draw any interference that the water of the plaintiff's field would flow through the defendant's field. The plaintiff must lead oral or documentary evidence in that regard to substantiate his case. The learned trial Judge was impressed by the natural position of the higher level of the land of the plaintiff and the lower level of the land of the defendant and held that it implied that the water from the land of the plaintiff flowed naturally to the land of the defendant and that it was an easement of necessity. Moreover because the levels were different that would not necessarily mean that the flow was towards the field of the defendant and the plaintiff had to prove it by leading evidence of the neighbours. But as no such evidence is forthcoming it cannot be said that the plaintiff has acquired easement right by necessity.

15. Seen in the above context, the plaintiff has failed to prove that there was error on the part of the lower appellate court in coming to the conclusion that the plaintiff alone had no right to file the present suit and also failed to prove that there was a case involving necessity to discharge rain water having regard to the surface of the land belonging to the parties and,

therefore, he has a right of easement by necessity.

16. For the foregoing reasons, the substantial questions on which the present appeal was admitted for hearing are answered in negative and against the plaintiff. Resultantly the present appeal is dismissed leaving the parties to bear their own costs. Interim relief, if any, granted earlier shall stand vacated.

20.6.2000. (A.M. Kapadia, J.)
